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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 113

U.S. INDUSTRIES, INC.; UNITED CONCRETE PIPE CORPORATION; UNITED STATES STEEL CORPORATION; KAISER STEEL CORPORATION; AMERICAN PIPE AND CONSTRUCTION COMPANY; SMITH-SCOTT CO., INC.; LLOYD R. EARL; ROBERT V. EDWARDS; ERNEST L. ILSLEY; RICHARD I. YOUNG; D. N. CHAMBERLAIN; CHARLES E. LAMAR; ROBERT C. SCRAGE; ELLIOTT E. BRAINARD; LAWRENCE R. TOLLENAERE; DALE E. McCOIG; THOMAS M. BYRD; JAMES A. MAGGETTI; J. G. THOMPSON; HERBERT THODY; VICTOR WEISMANN; FRANK COOK; PAUL WING; and WILLIAM N. SCOTT,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION; THE HONORABLE HARRY C. WESTOVER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION; UNITED STATES OF AMERICA, PLAINTIFF IN CRIMINAL NOS. 33338, 33339, 33340, 33341 and 33342; BATRIS W. PEROVICH, PLAINTIFF IN CIVIL NO. 63-278-HW; NORTHWEST PIPE LININGS, PLAINTIFF IN CIVIL NO. 63-279-HW; INPLACE LININGS, INC., PLAINTIFF IN CIVIL NO. 63-321-HW; NO-JOINT CONCRETE PIPE CO.; PLAINTIFF IN CIVIL NO. 63-028-HW; NO-JOINT CONCRETE PIPE CO. CORP. OF SOUTHERN CALIFORNIA *ET AL.*, PLAINTIFFS IN CIVIL NO. 64-374-HW; and W. M. LYNCH CO., *ET AL.*, PLAINTIFFS IN CIVIL NO. 64-858-HW,

Repondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Repondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered April 7, 1964, denying Petitioners' Petition for Writ of Prohibition and for Writ of Mandate.

Opinions Below.

The Court of Appeals for the Ninth Circuit wrote an opinion in this case in connection with its denial of petitioners' Petition for Writ of Mandate and for Writ of Prohibition. Such opinion is annexed as an Appendix to this Petition. The extraordinary writs were sought to compel the vacation of a written order of the District Court for the Southern District of California, Central Division, entered October 6, 1964. No opinion was written in connection with such order.

Grounds of Jurisdiction.

Petitioners' Motion for Leave to File and Petition for Writ of Prohibition and for Writ of Mandate, Either or Both in the Alternative, and for Any Additional Relief Appropriate, was filed with the United States Court of Appeals for the Ninth Circuit on October 8, 1964. The Motion was granted and the respondents to the Petition were directed to show cause why the Petition should not be granted by Order of the Court of Appeals entered on October 12, 1964 [R. p. 197]. On April 7, 1965, there was entered the Order of the Court of Appeals denying the Petition. No Petition for Rehearing was filed. This Court has jurisdiction to issue a Writ of Certiorari to the Court of Appeals for the Ninth Circuit in this case under the provisions of Section 1254(1), Title 28 of the United States Code.

Question Presented.

Is it not an abuse of discretion for a District Court, absent any showing whatsoever of compelling and particularized need and merely as an incident to discovery in civil proceedings, to order disclosure of a Government Memorandum consisting of information obtained

through the grand jury process and conceded by the Government to be within the protective cloak of Rule 6(e) of the Federal Rules of Criminal Procedure?

Rule.

This case involves the following provision of the Federal Rules of Criminal Procedure:

> "(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

Rule 6(e), Federal Rules of Criminal Procedure.

Statement of the Case.

On March 10, 1964, a grand jury sitting in the Southern District of California returned five indict-

ments alleging violations of the Sherman Act (15 U.S.C. §1) and naming some of the Petitioners as defendants.[1] The indictments arose out of the grand jury's investigation of the concrete and coated steel pipe industries. On March 30, 1964, counsel for the defendants in the five criminal cases applied to the Honorable Albert Lee Stephens, Jr., for permission to plead *nolo contendere*, which he granted. At that time Judge Stephens ordered that the "reports of the probation office be sealed and be confidential to all" but the Court in connection with sentencing [R. p. 127].[2] At a subsequent hearing regarding the procedure to be followed in connection with pre-sentence reports, defendants suggested, in view of possible treble damage cases, the following: that the Government be afforded the opportunity to submit to the Probation Officer whatever information it considers to be material to the Probation Officer's report and that this information be submitted on "an Ex Parte basis without any right of review by the defendants except as it may ultimately be included in the report"; that counsel for defendants be afforded an opportunity to make a like submission on behalf of their defendants; and that "all of the proceedings before the Probation

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[1]Petitioners U.S. Industries, Inc.; U.S. Steel Corporation; Kaiser Steel Corporation; United Concrete Pipe Corporation; American Pipe Corporation; Smith-Scott Co., Inc.: Ernest L. Ilsley, an official of Kaiser Steel Corporation; Lloyd R. Earl and Richand I. Young, respectively Chairman of the Board and Vice President of United Concrete Pipe Corporation; Robert V. Edwards, President of American Pipe and Construction Company; William N. Scott, President of Smith-Scott Co., Inc.; and D. N. Chamberlain were defendants in one or more of the criminal actions.

[2]References herein to "R." are to the record in this case certified to this Court by the Clerk of the United States Court of Appeals for the Ninth Circuit.

Officer be by order of the Court treated in all respects as confidential, as I am sure the rule in this Circuit already is" [R. pp. 132-33]. The Court and counsel for for the Government responded to the above as follows:

> "The Court: Well, I think that is a fair approach to it. * * * I don't think there is any doubt in anyone's mind but that all the procedures with the probation officer are strictly confidential. Those matters which are reduced to writing in a report for the court will be before the court, and also be submitted to counsel for both sides so they can see it prior to the time sentence is imposed.
>
> * * *
>
> "The Court: * * * But what we will do, as far as that goes, is as in all other criminal cases, the report will be available to Government and defense counsel prior to the hearing. Then I will hear from both sides at the time of the hearing prior to passing sentence.
>
> "Miss Svedberg: Do I understand Mr. Johnson's suggestion to be that the Government make its report to the probation officer or to you?
>
> The Court: No, to the probation officer, not to me.
>
> Miss Svedberg: I see. Then this would become part of the probation report, which again would be confidential" [R. pp. 134-135].

As illustrated above, no objection to this procedure was raised by the Government at the hearing on April 13, 1964.

Subsequent to the April 13, 1964 hearing, the Government prepared a "MEMORANDUM . . . RELATING

TO THE IMPOSITION OF SENTENCE AND FINES" (hereinafter referred to as "Government Memorandum" or "Memorandum"). According to counsel for the plaintiffs, the Government attempted to file this Memorandum with the Court, not the Probation Officer (apparently disregarding Judge Stephens explicit directions). However, upon the order of Judge Stephens, the Clerk refused to file the Memorandum and it was then forwarded to the Probation Officer. For some reason the Probation Officer included the Government Memorandum as part of the presentencing report [R. Document no. 210, p. 6].The various presentence reports (but *not* the Government Memorandum) were made available for review by defense counsel two days prior to the sentencing hearing. The day before the hearing, counsel for one of the corporate defendants telephoned the Probation Officer to inquire whether certain items he had submitted to the Officer on behalf of the defendant he represented had been furnished to Judge Stephens. During the conversation, counsel learned that a Government Memorandum of whose existence he had not been aware had been submitted to the Court as part of the probation report. This was the Memorandum which Judge Westover subsequently ordered disclosed. After advising other of defendants' counsel that they apparently had not read the complete probation report, he and an associate of his firm who represented one of the individual defendants proceeded to Judge Stephens' chambers and requested permission of his secretary to read the Government Memorandum in order to prepare for the sentencing hearing. After consulting with Judge Stephens in his office, she returned five or ten minutes later with two copies of the Memorandum [R.

Document no. 213, affidavit of Gordon Johnson]. In the interval it appears that Judge Stephens had telephoned Stanley E. Disney, chief of the Los Angeles office of the Antitrust Division, to see if the Division had any objection to defendants' counsel reading the Memorandum. According to counsel for plaintiffs, Disney stated the Government's position to be

> "that it would oppose such disclosure to the defense lawyers *unless the document would be filed and became part of the pleadings in the criminal cases*" [R. Document no. 210, pp. 6-7].

Judging by Judge Stephens' remarks at the sentencing hearing, he told Mr. Disney that he would file the document but that it would be sealed and made available to counsel for all defendants upon his order [R. p. 140].

In any event, upon returning from Judge Stephens' office with copies of the Memorandum, his secretary informed counsel that it was Judge Stephens' order that they could read the document in her office but not elsewhere and that they could not make any notes or copies [R. Document no. 213, affidavit of Gordon Johnson]. Many, but not all, counsel for defendants skimmed the Memorandum on the same day to prepare for sentencing. None of the attorneys were aware that the Memorandum contained grand jury matter until they read it [R. Document no. 213, affidavits].

In March of 1963, while the grand jury was still sitting, three civil complaints were served and filed naming numerous parties as defendants, only two of which were eventually indicted by the grand jury.[3] The plain-

[3] American Pipe and Construction Co. and United Concrete Pipe Corporation.

tiffs claimed treble damages for alleged violation of the federal antitrust laws. Although the defendants named in those actions succeeded in having the original complaints dismissed, amended complaints were filed in June, 1963. (Both the original and amended complaints name the same defendants.) Those three cases as amended, *Perovich v. Pipe Linings, Inc.* (Civ. No. 63-278-HW); *Northwest Pipe Linings v. Pipe Linings, Inc.* (Civ. No. 63-278-HW); and *Inplace Linings, Inc. v. Pipe Linings, Inc.* (Civ. No. 321-HW) are substantially similar in most respects; each of the complaints names the same defendants as the other two complaints, and each alleges basically identical violations of the antitrust laws. Those three cases will be referred to in this Petition as the "*Perovich*" cases.

In July, 1963, a complaint was filed and served alleging violation of the Sherman Act by certain of the Petitioners herein[4] as well as others, under which the plaintiff sought to recover treble damages. This complaint was based on a different set of circumstances than the above *Perovich* cases but claimed to be part of the same conspiracy. Subsequently, in March, 1964, two additional complaints paralleling the July, 1963 complaint were filed. (All three complaints are now pending in the Southern District of California, Central Division). In those three cases, *No-Joint Concrete Pipe Co. v. American Concrete Agricultural Pipe Association* (Civ. No. 63-928-HW); *No-Joint Concrete Pipe Corp. of Southern California, et al. v. American Concrete Agricultural Pipe Association* (Civ. No. 64-374-HW); and *W. M. Lynch Co., et al. v. American*

[4]American Pipe and Construction Co. and United Concrete Pipe Corporation.

Concrete Agricultural Pipe Association (Civ. No. 64-858-HW), the same corporations were named as defendants (not the same, however, in all respects as those named in the *Perovich* cases) and substantially the same causes of action were alleged; accordingly, those cases will be referred to as the *"No-Joint"* cases. Only two of the *No-Joint* defendants were indicted by the grand jury.[5] Jurisdiction of the District Court in both the *Perovich* and *No-Joint* cases rested on the federal antitrust laws (15 U.S.C. § 1 *et seq*).

On June 30, 1964, and July 1, 1964, counsel for plaintiffs in both the *No-Joint* cases and the *Perovich* cases filed motions before the Honorable Harry C. Westover, the District Judge in charge of the civil cases, asking the Court to vacate or modify the order of Judge Stephens which sealed the Government Memorandum and to permit the plaintiffs to obtain a copy of that Memorandum from the Government [R. pp. 4-32]. When those motions came before Judge Westover on July 13, 1964, he was reluctant to upset an order of another judge and suggested that the plaintiffs bring the matter before Judge Stephens [R. pp. 157-158]. Thereafter, as a device to obtain a ruling from Judge Stephens, counsel for plaintiffs addressed a *subpoena duces tecum* to Stanley E. Disney of the Antitrust Division, requiring him to produce the Government Memorandum at a deposition hearing.

On August 31, 1964, the Government, admittedly acting for the benefit of the plaintiffs, moved Judge Stephens to amend his order of June 19, 1964, to permit the plaintiffs to inspect the Government Memo-

[5]See footnote 4.

randum; at the same time the Government moved to quash the *subpoena duces tecum* [R. pp. 44-54]. On September 14, 1964, the matter was brought before Judge Stephens on the Government's motion. However, on his own initiative, he decided to transfer the matter back to Judge Westover since it involved a question of disclosure for discovery purposes in the civil cases pending before Judge Westover. Accordingly, the Government renoticed its motion for hearing before Judge Westover [R. pp. 80-82]. The plaintiffs in both the *No-Joint* cases and the *Perovich* cases also renoticed their original motions of June 30 and July 1 [R. pp. 83-84]. On September 28, 1964, the Court ruled from the bench that the sealing order of Judge Stephens should be lifted, and directed the Government to prepare the form of order [Rp. pp. 189-193].

The Government prepared a form of order which simply directed the unsealing of the Memorandum, and quashed the *subpoena duces tecum* [R. pp. 115-119]. Since the form of order prepared by the Government made the Memorandum freely available to anyone, the Petitioners who were parties to that proceeding, although objecting to any disclosure, proposed an order designed to limit the extent of the violation of grand jury secrecy by limiting disclosure to counsel for plaintiffs subject to certain terms and conditions [R. pp. 99-114]. In their proposed order, the Petitioners also requested Judge Westover to certify the issue of disclosure of the Government Memorandum to the Court of Appeals pursuant to the provisions of Title 28 U.S.C.

Section 1292(b). However, on October 6, 1964, Judge Westover denied the Petitioners' request for certification of the question, and signed the Government's proposed order which unsealed the Memorandum without limitation.

On October 9, 1964, Petitioners filed in the Court of Appeals for the Ninth Circuit their Motion for Leave to File and Petition for Writ of Prohibition and for Writ of Mandate, Either or Both in the Alternative, and For Any Additional Relief Appropriate. Jurisdiction of the Court was invoked under the All Writs Statute, 28 U.S.C. Section 1651. The Petitioners were some of the defendants in the civil cases who also had been indicted by the Grand Jury,[6] certain corporations who were not parties to the civil actions but had been indicted by the Grand Jury,[7] certain individuals who had been indicted by the Grand Jury but not made defendants in the civil actions[8] and certain other individuals who had testified before the Grand Jury but were not otherwise involved in either the criminal or civil cases.[9] Petitioners proceeded by extraordinary writ

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[6]American Pipe and Construction Co. and United Concrete Pipe Corporation.

[7]Kaiser Steel Corp., United States Steel Corporation, U.S. Industries, Inc. and Smith-Scott Co., Inc.

[8]Lloyd R. Earl, Chairman of the Board of United Concrete Pipe Corporation; Robert V. Edwards, President of American Pipe and Construction Co., Richard I. Young, Vice-President of United Concrete Pipe Corporation; Ernest L. Ilsley, an official of Kaiser Steel Corporation and William N. Scott, President of Smith-Scott, Co., Inc.

[9]Charles E. Lamar, Robert C. Schrage, Elliott E. Brainard, Lawrence R. Tollenaere, Dale E. McCoig, Thomas M. Byrd,

since the harm caused by the order — wholesale disclosure of grand jury matter — would have been immediate and irreparable and could not have been remedied by appeal from a final judgment, and since even the remedy of appeal from a final judgment was closed to two other groups of Petitioners, namely, the corporate and individual Petitioners not named as defendants in the civil cases but indicted by the Grand Jury and the individual Petitioners who testified before the Grand Jury but were not parties to the civil cases.

The Court below granted the Motion and on October 12, 1964, ordered the respondents to show cause why the Petition should not be granted [R. pp. 197-198]. After all briefs had been filed and oral argument heard, the Court issued a further order, dated February 18, 1964, providing for inspection by itself in camera of the Government Memorandum. On April 7, 1964, the Court issued its opinion and order denying the Petition and sustaining the order of the District Court unsealing the Memorandum, as modified by the Court of Appeals. The Court modified the Memorandum in camera, apparently by deleting identifying references to witnesses. The Petitioners promptly applied for a stay of the Court's order authorizing disclosure of the revised Memorandum. The Court of Appeals granted the stay on April 9, 1965, pending disposition of this petition for writ of certiorari.

James A. Maggetti, J. G. Thompson, Herbert Thody, Victor Weismann, Frank Cook, D. N. Chamberlain and Paul Wing.

REASONS FOR GRANTING THE WRIT.

Our starting point in this case, as it has been for this Court in like cases, is "a long established policy that maintains the secrecy of the grand jury proceedings in the federal courts" (*United States v. Procter & Gamble,* 356 U.S. 677, 681 (1958)). This policy is reflected in Rule 6(e) of the Federal Rules of Criminal Procedure and has been expressed in a long series of decisions by this Court recognizing that "grand jury testimony is ordinarily confidential" (*United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 233 (1940)) and protecting the "indispensable secrecy of grand jury proceedings" (*United States v. Johnson,* 319 U.S. 503, 513 (1943)). Although the rule of secrecy does not insulate grand jury matter against every contingency, this Court has made it plain that only "compelling necessity" and "particularized need" can justify its disclosure (See *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958)). By ordering disclosure of the Government Memorandum, even in edited form, absent any showing whatsoever of compelling and particularized need and in the face of persuasive considerations demanding continued secrecy, the Court below destroyed an essential safeguard of the grand jury process. Controlling decisions of this Court dictate an opposite result.

There is no question but that the Government Memorandum is grand jury matter within Rule 6(e). The recollection of counsel who read the Memorandum prior to sentencing is that the document was "an abstract of testimony before the grand jury" [R. Document no. 213, affidavit of Gordon Johnson]. The Government conceded before the District Court [R. p. 148] and again

before the Court of Appeals [R. Document No. 212, p. 2] that the Memorandum contained grand jury matter and came within the provisions of Rule 6(e). The Court of Appeals reached the same conclusion. Since the Memorandum constitutes grand jury matter, decisions of this Court permit disclosure of its contents only upon demonstration of compelling and particularized need.

Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395 (1959);

United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

The only showing of need attempted by plaintiffs amounts to no more than a claim that the complaints in the *Perovich* and *No-Joint* cases allege substantially the same conspiracy as that charged in the indictments [R. pp. 9, 27]. Such a claim might be thought to have been finally disposed of by *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). There the Government used a grand jury transcript to prepare a civil case for trial, and the defendants moved for discovery and production of the transcript for the same purpose. Conceding that "the relevancy and usefulness of the testimony sought were, of course, sufficiently established" (356 U.S. 677, 682), this Court held that the defendants had failed to make a showing of compelling and particularized need adequate to override the policy of grand jury secrecy. The Court of Appeals nonetheless ordered disclosure in this case.

In the view of the Court of Appeals, its task was "to examine not "only the need of the party seeking disclosure, but also the policy considerations for grand jury secrecy as they apply to the request for disclosure . . ."

and, when so examined, the Court found no policy served by continued secrecy which could not be satisfied by deletion of certain matter from the Memorandum (apparently identifying references to witnesses); with respect to the plaintiffs' need for the Memorandum, it was then enough to state that "we cannot say the respondents' need is illusory."

The Court of Appeals visualized grand jury secrecy as supported by five considerations:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

The first three the Court believed inapplicable because the Memorandum was prepared and filed after the entry of *nolo* pleas in the criminal cases and the motion to unseal came after final termination of all criminal proceedings. The fifth was also viewed as inapposite in this case on the ground that "indictments were returned against all of the corporate petitioners and six of the individual petitioners." The only justification the Court

could find for continued secrecy rested on the fourth ground—"to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes." This interest in secrecy the Court of Appeals considered sufficiently protected by its deletions from the Government Memorandum.

1. Absent a Showing of Particularized and Compelling Need Grand Jury Matter May Not Be Disclosed.

The Court of Appeals erred in allowing the plaintiffs to escape their obligation to establish at least some measure of need beyond mere discovery. As the record demonstrates, plaintiffs made no factual showing of need at all; they merely asserted that disclosure appeared reasonably calculated to lead to the discovery of admissible evidence [R. pp. 9, 27]. Plaintiffs' lack of showing was not excused by the Court's determination that, in large degree, the reasons for secrecy no longer applied. On the contrary the proper balance between secrecy and disclosure tips to the side of disclosure only upon an affirmative demonstration of need, never solely upon a negative showing that the full rigor of the considerations demanding secrecy has relaxed. The opinion of the District Court in *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962), accurately describes the principle. In that case, a private antitrust suit, the plaintiffs sought disclosure of a witness' grand jury testimony. They argued that the subject matter of his testimony had been covered in his deposition and was,

therefore, no longer secret. Rejecting the contention, the court stated:

> "Plaintiffs have asserted that if all of Allen's Grand Jury testimony has been repeated in the deposition, that testimony is no longer secret and no harm can come from disclosure. But this ignores the heart of the matter. As outlined before, the Court must consider two policies, one requiring secrecy and the other disclosure. And there can be no policy in favor of disclosure unless there is particular need. The lack or improbability of harm is but a factor in the evaluation of the need for secrecy. It is not a factor demonstrating a need for disclosure. While the need for secrecy may not be apparent in a particular case, it must be kept in mind that there is a general policy, fundamental and historically supported, which demands secrecy. Secrecy must still prevail in the absence of *particular compelling need.* In the tradition of the test established by Judge Kirkpatrick, and adopted by the Supreme Court in Procter & Gamble, disclosure cannot be compelled by the negative fact that there may be no immediate need for secrecy, but only by the positive need for disclosure. If judicial determination could be made by something as simple as a mechanical balance, the weight on the side of disclosure would have to clearly tip the balance in its favor."
>
> *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 486, 489 (E.D. Pa. 1962).

2. Substantial Reasons Requiring Grand Jury Secrecy Apply in This Case.

More important still, the Court of Appeals improperly assessed the various factors bearing on its determination that secrecy no longer was compelled.

a. Disclosure of Grand Jury Matter Operates to Curtail the Grand Jury's Function.

First, although it evidenced great concern for the possibility that disclosure of the Government Memorandum might inhibit the testimony of future grand jury witnesses, it gave no consideration at all to the impact of disclosure on future grand jurors. The Court evidently thought that the interest in insuring "the utmost freedom to the grand jury in its deliberations . . ." evaporated as soon as this particular grand jury concluded its investigation. Yet revelation of the proceedings of past grand juries discourages free exercise by future grand jurors of their unique investigatory and accusatorial powers. This was the conclusion reached by this Court in *Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395 (1959). There the defendants claimed the right to examine the grand jury testimony of a key Government witness for purposes of cross-examination. The grand jury investigation, which resulted in indictment, had terminated. The demand for grand jury minutes was made only after direct examination of the witness at the trial. In an opinion which rejected an asserted claim of absolute right to the grand jury matter absent any showing of particularized need, the Court pointed to the danger overlooked in this case by the Court of Appeals:

> "The reasons therefor [grand jury secrecy] are manifold and are compelling when viewed in the

light of the history and modus operandi of the grand jury. Its establishment in the Constitution 'as the sole method for preferring charges in serious criminal cases' indeed 'shows the high place it [holds] as an instrument of justice.' Costello v. United States, 350 US 359, 362, 100 L ed 397, 401, 76 S Ct 406 (1956). Ever since this action by the Fathers, the American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.' Ibid. Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. Id 350 US at 362, 363. *To make public any part of its proceedings would inevitably detract from its efficacy. Grand Jurors would not act with that independence required of an accusatory and inquisitorial body.* * * *"

Pittsburgh Plate Glass Co. v. U.S., 360 U.S. 395, 399-400 (emphasis added).

b. Wholesale Publicity to Grand Jury Matter Condemns Those Investigated in Violation of Fundamental Notions of Fairness.

The Court below inexplicably dismissed from consideration the fifth factor which, in its opinion, underpins the principle of grand jury secrecy—"to protect the innocent accused who is exonerated from disclosure that he has been under investigation. . . ." The reason given by the Court was that "indictments were returned against all of the corporate petitioners and six of the individual petitioners." This unaccountably ignores the

remaining individual petitioners who were not indicted. Further, the Court delineated too narrowly the reason for secrecy it was attempting to articulate; innocence or guilt can be determined only by a court, and all persons involved in grand jury proceedings, because of considerations inherent in the very nature of the grand jury process, are entitled to protection against disclosure of a summary of a grand jury investigation like the Government Memorandum.

Grand jury proceedings, although justified by the need for an effective accusatory and investigatory body, are inherently prejudicial. They are conducted in a cloak of secrecy much like the greatly feared Star Chamber proceedings of the past.

The prosecutor who appears before the grand jury is essentially unfettered in his presentation of evidence; his beliefs and training may cause him to assume a totally adversary role. Since the prosecutor works virtually alone with the grand jury, a close relationship may evolve which gives him great influence over the attitudes and decisions of the grand jury. And the impulse of the grand jury itself is that of accuser.

The drama portrayed before a grand jury is seen from a dimensionless perspective. The accused has no right to submit evidence to the grand jury, even if the United States Attorney General consents. *United States v. Blodgett,* 30 Fed. Cas. 1157, 1158 (S.D. Ga. 1867). See also *Duke v. United States,* 90 F. 2d 840 (4th Cir. 1937). He has no right to ask that witnesses in his behalf be produced and examined. *Charlton v. Kelly,* 229 U.S. 447, 462 (1913). Nor has he a right to appear in person or by counsel to cross-examine wit-

nesses and review evidence. *Boehm v. United States,* 123 F. 2d 791, 806 (8th Cir. 1941). See, generally, Orfield, "The Federal Grand Jury," 22 F.R.D. 343, 385 (1959).

In addition, there are no barriers to the presentation of prejudicial and incompetent evidence. In *United States v. Smyth,* 104 F. Supp. 283, 298 (N.D. Cal. 1952), Judge Fee noted that grand jurors have a "right to use rumors, hearsay, reports and even suspicion in initiating an investigation. . . ." A grand jury may consider incompetent evidence in reaching its conclusions. In *Costello v. United States,* 350 U.S. 359 (1955), the Supreme Court stated that 'neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," and refused to quash an indictment where "all the evidence before the grand jury was in the nature of 'hearsay'." 350 U.S. at 362, 363. In short, the accused, and the witnesses called before the grand jury, are all subject to procedures which, if conducted publicly, would be obnoxious to deeply-felt notions of fairness.

Wholesale disclosure of matters occurring before a grand jury after the proceedings have come to a close is no less abhorrent. Disclosure would pervert to strange uses the coercive power of the government to investigate crime through the secretive, compulsory process of the grand jury: disclosure metamorphosizes that power into the power to invoke the sanctions of publicity upon persons drawn under investigation, whether probable cause exists or not. Yet the investigated go without the protection of counsel and the rights of confrontation and cross-examination; they have no op-

portunity to introduce evidence in their own behalf and cannot invoke safeguards against introduction of incompetent and prejudicial evidence. It is inescapable that the power of the Government would be so perverted if wholesale revelation of grand jury matter is permitted, as in this case, absent any showing of need more pressing than ordinary discovery, to say nothing of the particularized and compelling need so clearly established by this Court as the standard of disclosure.

c. Disclosure of Grand Jury Matter Discourages Free Testimony by Grand Jury Witnesses.

The Court of Appeals erred not only in excluding from consideration compelling reasons demanding continued secrecy. It also misjudged the problem posed by the sole reason it saw as applicable in this instance—the policy of encouraging free and untrammeled testimony by future grand jury witnesses. The Court evidently thought to dispose of the problem merely by deleting references to witnesses' names. But the recital of events and the identity of those reciting them are tied in a Gordian knot which cannot be so easily loosened. If it is true that a major consideration underlying the policy of secrecy, particularly in investigations of antitrust violations, is the supposition that witnesses will guard their testimony if they know their identity will be disclosed from fear of retaliation by employers, suppliers and others in the industry under investigation, then the Court's expedient must prove ineffective in many cases. Those at whom the investigation is directed as well as others with some knowledge of the facts under investigation frequently would be in a position to connect certain testimony with individual sources.

Moreover, witnesses may object not merely to disclosure of their identity but also to public dissemination of the substance of their testimony. If a grand jury is to function effectively as an investigatory body, witnesses summoned before it may be called upon to relate suspicion, rumor, gossip and hearsay, however unfounded. Responsible witnesses cannot be expected to divulge such material freely, absent a meaningful guarantee of secrecy; the prospect that unfounded statements may be disclosed to the public operates to discourage the conscientious, honest witness. It is another matter if the information he provides will come to light only in a judicial proceeding, hedged by traditional safeguards.

3. Prior Disclosure Does Not Justify Total Disclosure.

The Court of Appeals drew additional support for its decision to authorize disclosure of the Government Memorandum, as modified, from the notion, novel to the principles governing grand jury secrecy, that prior limited disclosure begets further disclosure. The Court seemed to feel that the opportunity given defendants' counsel to review the Memorandum prior to sentencing somehow "prejudices" the plaintiffs in the civil cases.

As the Court of Appeals recognized, however, the Government Memorandum was not disclosed to the defendants in the criminal cases but only to their counsel. There has been no subsequent disclosure by counsel of the contents or details of the Memorandum to the defendants or anyone else. Counsel have done no more than mention the general nature of the Memorandum. And the disclosure to defendants' counsel

which did occur was so limited as to be of no use to counsel in preparing for the civil cases: under Judge Stephens' instructions, counsel were permitted to review the Memorandum in the office of his Secretary only for a few minutes, and were unable to make copies of the Memorandum. (See the affidavits of counsel which set forth in detail the circumstances under which they perused the Memorandum and the limited nature of their review [R. Document no. 213, affidavits]. As would be expected from the circumstances under which the Memorandum was reviewed, counsel retain only the vaguest recollection of the general nature of the document. Obviously, plaintiffs can encounter no prejudice in preparation or trial of the civil cases.

Even if defendants' counsel were able to utilize the Memorandum in preparation of the civil cases, there still could be no further disclosure. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), flatly repudiated the notion that inequality of access to grand jury matter warrants disclosure. The Government in that case openly admitted that it was using a grand jury transcript in preparation of a civil antitrust action. Reversing the trial court, this Court denied the defendants in the civil action access to the transcript even though "the relevancy and usefulness of the testimony sought were, of course, sufficiently established." (356 U.S. 677, 682). The Court held that the plaintiff's full knowledge and use of the grand jury transcript in preparation of its civil action did not vitiate the policy surrounding grand jury proceedings with secrecy:

> "If the grand jury transcript were made available, discovery through depositions, which might involve delay and substantial costs, would be avoided. Yet

> these showings fall short of proof that without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done. * * *".
>
> *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)

Thus this Court has rejected already the notion that knowledge of grand jury matters by one party dictates disclosure to all.

In the light of *Procter & Gamble* it is difficult to see how proper disclosure of grand jury matter to counsel for defendants in a criminal case, solely for the purpose of preparation for a sentencing hearing, can imply further disclosure of a document otherwise withheld from scrutiny by the weighty considerations responsible for our long tradition of grand jury secrecy. Even in the present posture of this case — following the termination of grand jury proceedings (a factor present in *Procter & Gamble* also) — disclosure of grand jury matter would operate prospectively to curtail the grand jury's function, to inhibit the testimony of witnesses and to penalize unfairly those investigated. These reasons remain whether or not counsel for defendants in criminal cases are shown grand jury matter inserted into the proceeding at the sentencing stage at the option of the Government.

Moreover, as *Procter & Gamble* recognized, we are not faced with the problem of weighing the policy in favor of secrecy against the need for information otherwise unobtainable. At most, is a matter of balancing secrecy against the possible "delay and substantial costs" involved in discovery. That balance can be struck in one

direction only—against disclosure. This was the result in *United States v. General Motors Corp.*, 15 F.R.D. 486 (D. Del. 1954). In that case, a civil antitrust proceeding, the defendants sought access to grand jury transcripts, arguing that the transcripts would be available to the Government at trial and that discovery should be had to eliminate such a tactical advantage. In denying defendant's motion, the Court pointed out that the defendant had "other discovery techniques at its disposal through which most of the information sought and clues to other possible sources may be obtained" (15 F.R.D. 486, 488). The avenues of discovery are open in this case as they were in *Procter & Gamble* and *General Motors.*[10]

As a practical matter there is no prejudice to plaintiffs because there was no disclosure to defendants'

[10]In fact, plaintiffs in the *No Joint* cases have instituted a vigorous program of discovery. Already the depositions of the following petitioners have been taken: Lloyd R. Earl, Chairman of the Board of United Concrete Pipe Corporation; Richard I. Young, Vice-President of United Concrete Pipe Corporation; Victor Weismann, Sales Manager of United Concrete Pipe Corporation; Robert V. Edwards, President of American Pipe and Construction Company; and Elliott E. Brainard, Executive Vice-President of America Pipe and Construction Company. In addition, a substantial number of other depositions have been taken. In recent proceedings before judge Martin Pence, in the District Court for the Northern District of California, Southern Division, Mr. Disney, Chief of the Los Angeles Office of the Antitrust Division, made the following remark regarding plaintiffs' deposition program: "Now, obviously I mean, we have read the depositions taken by plaintiffs' counsel, they have developed a lot of information regarding the conspiracy." The Court then inquired, "You mean the Government didn't have that information?", and Disney replied, "That's right, sir." Reporter's Transcript of the proceedings of March 11-12, 1965, in the *No Joint* cases and related cases, at page 26.

counsel of any assistance to them in preparation of the civil actions. Even notions of parity of access could dictate no more than disclosure limited to counsel, not dissemination to the public as ordered by both Courts below. But notions of parity have no application here. In view of the opportunity of plaintiffs to utilize the ordinary procedures of discovery and the continuing vitality of compelling reasons for nondisclosure, only one conclusion can be drawn — the Court below erred in ordering disclosure of the Government Memorandum.

4. Disclosure of the Government Memorandum by the Courts Below Is Abuse of Discretion.

In this case the Court of Appeals ordered disclosure of a Government document admittedly consisting of grand jury matter upon the bare conclusion that, ". . . we cannot say the respondents' need is illusory." This statement of the Court testifies to the failure of respondents to make any showing whatsoever of compelling and particularized need. That alone condemns the decision. The strength of the policy shrouding grand jury proceedings in secrecy may be gauged by the holding of this Court in *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959), that the doctrine of *Jencks v. United States,* 353 U.S. 657 (1957), does not apply to grand jury proceedings. The decision in *Jencks,* and the statute which followed it, established that a defendant in a criminal case is entitled to disclosure of pretrial statements of prosecution witnesses. Yet this Court held in *Pittsburgh Plate Glass*

that the policy of grand jury secrecy placed on the defense in a criminal antitrust case the burden of establishing " ' a particularized need' " for the grand jury testimony of an important Government witness. Certainly, no less a burden rests on plaintiffs in civil actions than on the accused in a criminal case. This Court has recognized need for disclosure, at trial, of grand jury testimony relating to a witness' testimony in court for purposes of impeachment, refreshing recollection or testing credibility (*United States v. Procter & Gamble Co.*, 356 U.S. 677, 683 (1958)). Lower courts have permitted disclosure to defendants seeking access to their own grand jury testimony to prepare their defense to charges of perjury before the grand jury (*United States v. Rose*, 215 F. 2d 617 (3d Cir. 1954); *United States v. Remington*, 191 F. 2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952)); and have even allowed limited disclosure at depositions of witnesses' grand jury testimony where examination of the testimony by the Court in camera reveals " 'material discrepancy or significant facts which the witness concealed, or failed to remember, at his deposition' " (*Allis-Chalmers Mfg. Co. v. Fort Pierce, Fla.*, 323 F. 2d 233 (5th Cir. 1963), quoting *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 486, 4 (E.D. Pa. 1962)). Plaintiffs in this case have made no similar showing; indeed, their demand for a document summarizing an entire grand jury investigation resembles the wholesale

disclosure of a grand jury transcript condemned in *Procter & Gamble*. Not having attempted to demonstrate particularized and compelling need, the plaintiffs have not even made a threshold showing of right to the grand jury matter here involved, and by ordering its disclosure the Court below clearly erred.

Further, the Court of Appeals neglected or misapplied crucial factors present in this case, factors which compel persistent secrecy. The free exercise by the grand jury of its traditional function and the protection of those caught in the dragnet of a wide ranging grand jury investigation both speak out firmly for continued secrecy. So too does the policy of encouraging full disclosure by witnesses before grand juries, and this interest the Court of Appeals did not, and could not, protect merely by deleting from the Memorandum references of witnesses' names.

Conclusion.

In ordering disclosure of the Memorandum, the Court of Appeals decided an important question of federal law in a way conflicting with governing decisions of this Court. If the novel principle announced by the Court of Appeals stands, grand jury matter which finds its way into Government documents of one kind or another will be disclosed routinely. The effect on the functioning of the grand jury system will be incalculably destructive, particularly in important areas of business activity regulated by federal statutes which establish parallel criminal

and civil remedies. For these reasons, as well as the others set forth above, the writ of certiorari sought herein should be granted.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeals.

Before JUDGES POPE, BARNES and ELY, Circuit Judges

This is a petition for writ of prohibition and for writ of mandate (either or both, in the alternative). Petitioners seek to reseal a government memorandum which the district court has determined to be a proper object of federal discovery proceedings. This court's jurisdiction to grant the requested relief is derived from the "All Writs" statute, 28 U.S.C. § 1651.

The government Document in dispute has been ordered unsealed for the use of plaintiffs in presently pending civil antitrust actions involving the concrete and coated steel pipe industry. The document had previously been prepared for sentencing purposes in the criminal antitrust proceeding from which these civil actions originate. Petitioners are corporations and corporate officers who had been indicted for violations of Section 1 of the Sherman Act, 15 U.S.C. §1, as well as other individuals who assert they testified before the grand jury which returned the indictments.

The indictment against a portion of the present petitioners had been returned on March 10, 1964. On March 30, 1964, the defendants, over objection by the government, were permitted to plead *nolo contendere*. Upon acceptance of these pleas, Honorable Albert Lee Stephens, Jr., United States District Judge, before whom the pleas were made, directed counsel for the defendants and the government to submit confidential reports to the probation officer, to facilitate his role as an advisor to the court in the sentencing process.

Pursuant to the above directions, the government prepared a "Memorandum of Government Relating to the Imposition of Sentences and Fines" which was transmitted to the probation officer. This document, though not a grand jury document, was admitted by the government to contain information within the purview of the grand jury secrecy provision of Rule 6(e) of the Federal Rules of Criminal Procedure. That rule provides in pertinent part:

> "*Secrecy of Proceedings and Disclosure.* Disclosure of matters *occurring before the grand jury* [emphasis added] other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding. . . ."

The government, however, recognized the propriety of the district court judge exercising his discretion to permit the defense counsel to inspect the memorandum so long as the memorandum was filed under seal in the criminal cases. The criminal cases were subsequently concluded with the imposition of sentences.

Prior to the termination of the criminal proceedings, six private treble damage suits had been commenced against those defendants who had been indicted for criminal violations of the Sherman Act. Subsequent to the imposition of sentences in the criminal proceedings, plaintiffs in the civil actions sought access to the above mentioned government memorandum. To this end, the private plaintiffs served a deposition *subpoena duces*

tecum on Stanley E. Disney, Chief of the Los Angeles Officer of the Antitrust Division. The government responded by requesting by motion that Judge Stephens modify the sealing order so as to permit plaintiffs access to the memorandum and to allow for the quashing of the *subpoena duces tecum* that had been served on Mr. Disney. The matter came before Judge Stephens who, on his own initiative, transferred the motion for hearing before Judge Harry C. Westover, before whom the civil antitrust cases were pending.

Judge Westover ruled that the sealing order should be vacated and the subpoena quashed. On October 6, 1964, an order to his effect was entered.

The question presented for our consideration is whether the district court in so ordering disclosure, committed an abuse of discretion in permitting civil plaintiffs access to a government memorandum which had been sealed because of its references to grand jury proceedings.

A preliminary matter is raised in the brief of respondents (plaintiffs in the pending civil actions). They contend that the government memorandum is not in any way protected by the cloak of secrecy of Rule 6(e). The essence of respondents' argument is that Rule 6(e) was intended only to protect the actual transcript of the grand jury proceedings. We do not read Rule 6(e) in so limited a manner. Under respondents' construction of the Rule, any document prepared *after* the grand jury proceedings—even a detailed summary or other exact reiteration of what transpired before the grand jury—would be outside the protection of Rule 6(e). Such a construction would peel back in its entirety the cloak of secrecy that presently surrounds the

proceedings. Lawmakers have not yet seen fit to allow such a wholesale disregard for the traditional secrecy of the grand jury.

In addition to misconstruing the scope of Rule 6(e), respondents argue the inapplicability of the Rule without any first-hand knowledge of the extent to which the memorandum unveils what transpired before the grand jury. Respondents seek to minimize the admission by the government to the effect that its memorandum clearly comes within the protective policy of Rule 6(e). We do not see how respondents' conjectural estimates as to the extent to which the memorandum reflects grand jury proceedings can overcome the admission by a co-party in interest, and a co-party that had in fact prepared the memorandum, that Rule 6(e) was applicable. All parties who were given the opportunity to inspect the document in question are unanimous in their opinion that the policy issues of grand jury secrecy were put in issue by this request for access to the document's contents.

But the fact that Rule 6(e) applies to the government memorandum is not dispositive of the issue presented by this petition. The secrecy that surrounds the grand jury is not absolute in nature. Rule 6(e) itself expressly provides that matters occurring before the grand jury can be disclosed where the court so directs. The question thus remaining, and the real question here presented, is whether the district court abused its discretion in ordering a disclosure in the present case.

Petitioners eloquently argue in their briefs that the unsealing order of the district court violates our traditional notions of grand jury secrecy. By the govern-

ment's admission, the presentencing memorandum contains direct references to "testimony," presumably given before the grand jury; to permit its disclosure to the public, argue petitioners, would destroy the cloak of secrecy. Petitioners recognize, however, as they must, that the right to maintain secrecy of grand jury proceedings is not an absolute one. They assert that in order to dispense with the secrecy a "particularized and compelling need" must be demonstrated. For example, we believe petitioners would recognize that were a grand jury witness subsequently indicted for perjury on the basis of his grand jury testimony, notions of fair play and justice would require that he have an opportunity to examine the grand jury transcript. Similarly, petitioners would, we believe, concede the right of a United States Attorney charged with contempt for his conduct before the grand jury to examine the transcript of those proceedings. In the facts of the present case, however, petitioners see no compelling need for disclosure such as exists in the above examples.

We agree with petitioners that a violation of the traditional grand jury secrecy should only be permitted upon a showing of "particularized and compelling need." But we cannot treat this test *in vacuo*. We must take recognition first of the fact that whether such a "need" exists is a matter designedly left initially to the discretion of the trial judge. In the absence of an absolute prohibition against disclosure, an exercise of judicial discretion is manifestly required. Secondly, it must be kept in mind that, in making a determination of when to permit a disclosure of grand jury proceedings, we are to examine, not only the need of the party seeking disclosure, but also the policy considerations for

grand jury secrecy as they apply to the request for disclosure there under consideration. In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need. This view of the necessity for a court to perform such a weighing process in amply demonstrated, we believe, by the remarks of Mr. Justice Brennan in his dissenting opinion in *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 403 (1959):

> "Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may and should be lifted, for to do so in such a circumstance would further the fair administration of criminal justice."

Our task of examining the policy considerations behind grand jury secrecy is facilitated by the universal adherence to the reasons expounded in *United States v. Amazon Ind. Chem. Corp.,* 55 F.2d 254 (D.C. Md: 1931), to-wit:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and un-

> trammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

These reasons have been consistently quoted with approval. See, *e.g., United States v. Procter & Gamble,* 356 U.S. 677, 681 n. 6 (1958); *United States v. Rose,* 215 F.2d 617, 628-29 (3d Cir. 1954).

In applying these policy reasons for secrecy to the facts of the present case, it immediately becomes apparent that the first three reasons have no relevance. As noted by the State of California in its *amicus curiae* brief, the memorandum was not prepared or filed until subsequent to the entry of the *nolo* pleas, and the motion to unseal followed the complete termination of the criminal proceedings. The grand jury thus had completed its investigation and returned its indictments long before the memorandum was prepared or its disclosure was sought by respondents. The fifth policy reason stated in *Amazon* is not appropriate to the present case because indictments were returned against all of the corporate petitioners and six of the individual petitioners. This leaves as the only basis for a compelling reason to maintain the traditional grand jury secrecy that of insuring untrammeled disclosure by *future* grand jury witnesses.

Respondents contend that the policy of secrecy for the purpose of encouraging untrammeled testimony is inapplicable to the present case because those whom the witness most had to fear have already inspected the government memorandum, viz., their own employers.

Petitioners seek to rebut this contention with evidence showing that witnesses fear retaliation from numerous sources other than their employers. We think there is some little validity to the contentions of each of the litigants as to what inhibits prospective grand jury witnesses. But we feel that, in the present setting, such issue is not controlling. We have examined the memorandum. We are convinced that if, on examination of the memorandum, the district judge determined that the references to the grand jury proceedings were so particularized that *future* grand jury witnesses might become inhibited if this present memorandum is disclosed, the district judge could, with little effort, delete the references to witness names or take any other action which best will maintain the document's substance while protecting the anonymity of the witnesses. *Cf. United States v. Grunewald,* 162 F.Supp. 621, 622 (S.D.N.Y. 1958).

Because this approaches a matter of first impression, however, we have taken upon ourselves the task of "policing" the memorandum. This task would ordinarily be undertaken by the trial court. Having examined the document in camera as the trial court might have done we have deleted such portions of the memorandum as we have deemed necessary in respect to the policy considerations behind the rule of secrecy of grand jury investigations. We have returned five originals of the document, as deleted (but without disclosing the deletions), to the District Court for filing, without seal, in the five actions below; retaining one copy as so revised for our own Court files, and retaining all excised copies in our own files, under seal.

We realize that the need of the present respondents for disclosure is not as pressing or consistent with the notions of justice as it is, for example, in the perjury and contempt illustrations we allude to above. Yet, we cannot say the respondents' need is illusory. This court's opinion in *Olympic Refining Co. v. Carter*, 332 F.2d 260 (1964), *cert. denied* November 9, 1964, typifies judicial appreciation of the benefits of a liberal discovery procedure. The facts in the present case lend additional support to a liberal discovery ruling, for here the document in question is of government origin and the party opposing disclosure has had an opportunity to inspect its contents.[1] It therefore seems highly inequitable and adverse to the principles of federal discovery to allow one party access to a government document and not the other. It is particularly inequitable when the policy reason for denying the other party access to the document is essentially inapplicable to the given situation. We cannot say that the district court judge has abused his discretion by ordering the document unsealed.

The petition is denied, and the district court order to unseal the government memorandum is sustained, subject to the modifications required by this opinion.

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[1]Counsel for petitioners assert that they alone, not their clients, had access to the memorandum. But knowledge of opposing counsel in itself prejudices respondents. Moreover, petitioners' counsel were not precluded from conveying what they learned from their inspection of the memorandum to their clients.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No.

U. S. INDUSTRIES, INC.; UNITED CONCRETE PIPE CORPORATION; UNITED STATES STEEL CORPORATION; KAISER STEEL CORPORATION; AMERICAN PIPE AND CONSTRUCTION COMPANY; SMITH-SCOTT, INC.; LLOYD R. EARL; ROBERT V. EDWARDS; ERNEST L. ISLEY; RICHARD I. YOUNG; D. N. CHAMBERLAIN; CHARLES E. LAMAR; ROBERT C. SCHRAGE; ELLIOTT E. BRAINARD; LAWRENCE R. TELLENAERE; DALE E. McCOIG; THOMAS M. BYRD; JAMES A. MAGETTI; J. G. THOMPSON; HERBERT THODY; VICTOR WEISMANN; FRANK COOK; PAUL WING; and WILLIAM N. SCOTT, *Petitioners,*

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, THE HONORABLE HARRY C. WESTOVER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, UNITED STATES OF AMERICA, Plaintiff in Criminal Nos. 33,338, 33,339, 33,340, 33,341, and 33,342, BATRIS W. PEROVICH, plaintiff in Civil No. 63-278-HW; NORTHWEST PIPE LININGS, Plaintiff in Civil No. 63-279-HW; INPLACE LININGS, INC., Plaintiff in Civil No. 63-321-HW; NO-JOINT CONCRETE PIPE CO., Plaintiff in Civil No. 63-928-HW; NO-JOINT CONCRETE PIPE CORP. OF SOUTHERN CALIFORNIA, et al., Plaintiffs in Civil No. 64-374-HW; and W. M. LYNCH CO., et al., Plaintiffs in Civil No. 64-858-HW, *Respondents.*

BRIEF ON BEHALF OF "NO-JOINT" AND "PEROVICH" RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF THE CASE

This proceeding involves a memorandum prepared by attorneys in the Antitrust Division, United States Department of Justice. The memorandum was *filed* in certain criminal antitrust cases in connection with the sentencing of the defendants all of whom had entered pleas of *nolo contendere*.[1] This brief is filed on behalf of the real parties in interest—the No-Joint plaintiffs[2] and the Perovich plaintiffs,[3] in six cases pending in the Southern District of California, Central Division.

The substantive allegations of the complaints in the No-Joint cases are substantially identical. They charge that beginning about 1950, defendants and certain co-conspirators in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 1, 2) engaged in a combination and conspiracy to restrain trade in and to monopolize the pro-

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[1]The term "criminal cases" refers to the five indictments (described hereinafter) filed in the United States District Court for the Southern District of California, Central Division, in which the corporate petitioners and some of the individual petitioners were named defendants. The case numbers of these criminal cases are 33338, 33339, 33340, 33341 and 33342.

[2]For convenience, the plaintiffs in the following three cases are referred to herein as the No-Joint plaintiffs and the cases shall be referred to as the No-Joint cases. *No-Joint Concrete Pipe Company v. American Concrete Agricultural Pipe Association, et al.*, No. 63-928-HW; *No-Joint Concrete Pipe Corp. of Southern California et al. v. American Concrete Agricultural Pipe Association, et al.*, No. 64-374-HW; *W. M. Lynch Co., et al. v. American Concrete Agricultural Pipe Association, et al.*, No. 64-858-HW.

[3]For convenience, the plaintiffs in the following three cases will be referred to as the Perovich plaintiffs and the cases shall be referred to as the Perovich cases. *Batris W. Perovich, et al. v. Pipe Linings, Inc., et al.*, 63-278-HW; *Northwest Pipe Linings, et al. v. Pipe Linings, Inc., et al.*, No. 63-279-HW; *Inplace Linings, Inc. et al.*, No. 63-321-HW.

duction and sale of concrete pipe and that the substantial terms of that conspiracy consisted of agreements to fix prices, divide territories, allocate customers and submit collusive bids. The complaints further allege that when the advent of the No-Joint machine threatened to upset that conspiracy and to secure for plaintiffs a substantial portion of business theretofore enjoyed by the alleged conspirators, defendants, in furtherance of the aforesaid combination and conspiracy, agreed by various means and methods to eliminate the competition of the plaintiffs and the No-Joint machine. Among the means alleged were agreements by defendants (1) to falsely and maliciously disparage pipe produced by the patented No-Joint machine, (2) to preclude No-Joint concrete pipe from being specified as an alternate to pre-cast concrete pipe produced by the defendants, (3) to submit bids at cost or less than cost, for the purpose of preventing plaintiffs from securing jobs and (4) to require contractors to buy pipe from defendants on an "all or none" basis to preclude the use of the No-Joint machine. Plaintiffs in each case seek treble damages pursuant to Section 4 of the Clayton Act. (15 U.S.C. 15.)

The amended complaints in the Perovich cases are also substantially identical. Each complaint contains two counts. The first count of each Perovich complaint alleges a conspiracy among the defendants to divide the business of inplace rehabilitation of steel and cast iron pipe and further alleges that, pursuant to that conspiracy, defendants agreed to apportion among themselves the taking of contracts below cost to preclude plaintiffs from securing such business. The second count alleges a conspiracy

among the defendants to allocate and divide among themselves the sale of concrete pipe in defined geographical regions. It also alleges that defendants allocated among themselves inplace rehabilitation of pipe and the sale and installation of new concrete pipe. Each plaintiff seeks treble damages under Section 4 of the Clayton Act. (15 U.S.C. 15.)

The proceedings below from which this petition for a writ of certiorari arises, can be summarized as follows:

On March 10, 1964, a federal grand jury in Los Angeles returned five indictments (the criminal cases).[4] Each of these indictments charged the named defendants with violations of the Sherman Act (15 U.S.C. 1) in the steel and concrete pipe industries. Specifically, each indictment charges, with respect to a delineated product line,[5] that the defendants named therein rigged bids and/or allocated markets.

On March 30, 1964, all defendants in all the criminal cases tendered pleas of *nolo contendere* which were accepted by the Court (Judge Albert Lee Stephens, Jr.) over the objection of the Government. On the date that those pleas were tendered and accepted, defendants, relying on the existence of the "private treble actions which are pending", urged the Court to seal the report of the

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[4]It is significant to point out that the first No-Joint case (No. 63-928-HW) and *all* of the Perovich cases were filed more than nine months *before* the return of the indictments on March 10, 1964.

[5]The product lines involved in each case are as follows: 33338—concrete pipe, pressure and non-pressure; 33339—large diameter steel pipe; 33340—large diameter pipe—steel and concrete; 33341—small diameter steel pipe; 33342—small diameter pipe—steel and concrete.

probation officer so that the data contained therein would be "confidential". (R. p. 127.) The Court granted this request. (Id.)

At a hearing before Judge Stephens in the criminal cases on April 13, 1964, defendants renewed this request for confidentiality "in the light of the special problem . . . of the treble damage case(s) . . ." (R. pp. 132-135.) At that time, the Court on the defendants' urging, ordered the Government to submit to the probation officer whatever information it deemed material to sentencing. And, upon the assurance by the Court that it would "have an opportunity to be heard in open court on the day of the sentencing" the Government offered no opposition to this proposal. (Id.)

Thereafter, the Government prepared a Memorandum captioned (so far as we know) "Memorandum Relating to the Imposition of Sentences and Fines". On May 12, 1964, the Government tendered this document to one of the deputy clerks of the Court below. But upon the order of Judge Stephens the Clerk refused to "file" the Memorandum. The Memorandum was, however, forwarded to the probation officer for the Southern District of California and he included it as part of his pre-sentencing report.

After the document had been transmitted by the probation officer to Judge Stephens, counsel for one or more of the defendants in the criminal cases requested an opportunity to examine the Government Memorandum. Judge Stephens then telephoned the Antitrust Division office in Los Angeles and requested that they permit the defendants' lawyers to read it. The Government (through

Mr. Stanley E. Disney, Chief, Los Angeles office of the Antitrust Division) took the position in this conversation with Judge Stephens that it would oppose such disclosure to the defense lawyers *unless the document would be filed and become part of the pleadings in the criminal cases.* In taking this position, the Government maintained that the Memorandum contained "grand jury material". Judge Stephens agreed that the Memorandum would be filed but under seal, and he then made it available to the defendants' lawyers. (R. p. 140.)

At the sentencing hearing in the criminal cases on June 19, 1964, Judge Stephens acknowledged that the Government Memorandum had been filed under seal. He said:

> "I told Mr. Disney (Chief, Los Angeles Office, Antitrust Division) that I would file that document. It would be sealed but it would be by my order available to counsel for all the defendants. That is what has been done." (R. p. 140.)

None of these "sealing orders" was ever reduced to writing. However, the Clerk of the Court below made the following entry on the docket sheet of each of the criminal cases:

> "Filed under seal memo. Govt. relating to Imp. sent. and fines—document placed in safe in Room 231. MD. JS. 3s. (S)"

On July 1, 1964, the No-Joint plaintiffs filed a motion (in which the Perovich plaintiffs joined) urging Judge Westover to enter an order which would have either vacated or modified, in the alternative, the sealing order

entered by Judge Stephens to permit these plaintiffs access to the Government Memorandum. (R. pp. 4-32.)

These motions came on for hearing before Judge Westover on July 13, 1964. At this hearing, Judge Westover observed:

> . . . I don't feel justified in attempting to vacate an order made by Judge Stephens in a criminal case. I think your procedure should be to try to get before Judge Stephens on some sort of a motion to modify the order. I can't tell you how to get at this, I don't know, but you will just have to try and see whether or not it will stand up." (R. pp. 157-158.)

The following day, counsel for the No-Joint plaintiffs noticed the deposition of Mr. Stanley E. Disney, Chief of the Los Angeles Office of the Antitrust Division, for August 5, 1964, and obtained from the Clerk of the Court below a subpoena, under Rule 45 (d), F.R.C.P., directing Mr. Disney to bring the "Government Memorandum" with him to his deposition. Later a revised notice of deposition changed the return date of the subpoena to September 5, 1964. The procedure followed by plaintiffs in this case (i.e., a deposition subpoena directing Mr. Disney to bring with him a copy of the sealed document) is exactly the same as was followed in *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir. 1964); cert. denied 85 S.Ct. 186 (1964).

On August 31, 1964, the Government noticed a motion before Judge Stephens in the criminal cases to (1) amend the sealing order and (2) quash the subpoena to Mr. Disney. This motion was noticed for hearing on Septem-

ber 14, 1964 before Judge Stephens. On or about September 10, counsel for the No-Joint plaintiffs, in a pleading captioned not only in the criminal cases but in the No-Joint cases as well, filed a "Memorandum on Behalf of 'No-Joint Plaintiffs' in Respect to the Government's Motion (a) For Amendment to Sealing Order and (b) To Quash Subpoena Duces Tecum" stating in substance that they would not oppose the Government's motion to quash the subpoena to Mr. Disney if the Government Memorandum on file with the Clerk were to be unsealed. The Perovich plaintiffs joined in and adopted that memorandum. The defendants in the criminal cases filed a memorandum opposing amendment of the sealing order.

On September 14, 1964, the matter came on for hearing before Judge Stephens. At that hearing, Judge Stephens referred the matter to Judge Westover—despite the urging of counsel for one of the defendants in the criminal cases that Judge Stephens retain "jurisdiction". Judge Stephens characterized the matter as "civil" in nature and expressed the view that because Judge Westover had all of the steel and concrete pipe damage cases before him (now eleven in number) Judge Westover should decide the question raised by the Government's motion. On the same date, September 14, 1964, the parties appeared before Judge Westover who directed that the matter be renoticed for hearing so that he could review the various memoranda that had been filed.

Accordingly, on September 15, 1964, the Government filed its "Second Notice of Hearing on Motion for (a) Amendment to Sealing Order and (b) to Quash Sub-

poena Duces Tecum" (R. pp. 80-82). On September 17, 1964, counsel for the No-Joint plaintiffs filed a Notice of Hearing of renewal of its previous motion to vacate or modify the sealing order originally filed on July 1, 1964 (R. pp. 83-84). Defendants filed a brief in opposition to these motions and the matter came on for hearing before Judge Westover on September 28, 1964, at which time the matter was fully argued.

On October 5, 1964, Judge Westover signed and filed his Order (approved as to form by the No-Joint plaintiffs) which (1) lifted the order sealing the Government Memorandum and (2) quashed the subpoena duces tecum directed to Mr. Disney (R. pp. 115-119).

On October 9, 1964, petitioners filed their petition for writ of prohibition or mandamus, in the alternative, in the Court of Appeals for the Ninth Circuit. On October 12, 1964, that Court ordered the respondents to show cause why the petition should not be granted (R. pp. 197-8). On April 7, 1965, the Court of Appeals issued its opinion denying the petition for either extraordinary writ. In its opinion, the Court however, noted:

> "Having examined the document in camera as the trial court might have done, we have deleted such portions of the memorandum as we have deemed necessary in respect to the policy considerations behind the rule of secrecy of grand jury investigations. We have returned five originals of the document, as deleted (but without disclosing the deletions), to the District Court for filing, without seal, in the five actions below; retaining one copy as so revised for our own Court files, and retaining all excised copies in our own files, under seal."

REASONS FOR REFUSING THE WRIT

Summary of Argument

Petitioners raise four points in support of their contention that the case was incorrectly decided by the Courts below. These points are:

1. Absent a showing of particularized and compelling need grand jury matter may not be disclosed;

2. Substantial reasons requiring grand jury secrecy still exist in this case;

3. Prior disclosure does not justify total disclosure;

4. Disclosure of the Government Memorandum by the Courts below was an abuse of discretion.

These contentions, examined separately or viewed cumulatively, are without merit.

Accepting, for purposes of this petition only,[6] the holding of the Court of Appeals that Rule 6(e) of the Federal Rules of Criminal Procedure was, in fact, applicable to the memorandum in question, it does not follow that the secrecy contemplated by the Rule is perpetual. The Court of Appeals effectively answered that contention when it said:

> "But the fact that Rule 6(e) applies to the Government memorandum is not dispositive of the issue presented by the petition. The secrecy that surrounds the grand jury is not absolute in nature. Rule 6(e) itself expressly provides that matters occurring before

[6] These respondents have consistently contended in the Courts below that the Government Memorandum was not subject to Rule 6(e). Cf. *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2nd Cir., 1960). Respondents believe that the Court of Appeals' conclusion to the contrary is wrong. However, it is unnecessary, at this stage to re-examine that question.

> the grand jury can be disclosed where the court so directs."

And it has long been settled that disclosure, pursuant to Rule 6(e), is left to the sound discretion of the trial judge and that discretion may be disturbed only where the discretion has been abused.

Nor are there substantial policy reasons requiring that the grand jury secrecy remain applicable to the memorandum in question. A careful review by the Court of Appeals of the policy considerations behind grand jury secrecy led the Court below to the conclusion that the only basis for maintaining secrecy here was that of "ensuring untrammeled disclosure by *future* grand jury witnesses". (Emphasis original.) And the Court thoroughly examined that reason and eliminated it when it excised portions of the memorandum so as to delete references to witnesses' names.

No question of whether prior disclosure "justifies" total disclosure is presented by this record. The sole question presented to the Court of Appeals which it characterized as "the real question here presented" was whether the District Court abused its discretion in ordering disclosure of the Government memorandum. And nowhere did the No-Joint or Perovich plaintiffs contend that prior disclosure "justified" total disclosure *per se*. Rather, it was urged that prior disclosure was a fact which the District Court properly consider in exercising its judicial discretion in connection with the motions to unseal pending before it. And the Court of Appeals endorsed this view.

Finally, it is clear that there is no abuse of discretion demonstrated by this record. Indeed, quite the contrary is true. Judge Westover could have abused his discretion only if Rule 6(e) would have *required* Judge Stephens to have the memorandum sealed in the first instance. But at no time did the petitioners ever contend that Rule 6(e) *required* Judge Stephens to seal the memorandum. And if Judge Stephens had the power to order the memorandum filed without sealing in the first instance, it cannot conceivably have been an abuse of discretion for Judge Westover to have ordered done what Judge Stephens could have and, we submit, should have ordered in the first instance.

The respondents have had their day in Court. Each of the contentions made here was meticulously examined by the Court of Appeals on a petition for an extraordinary writ. That Court, in effect, granted the petitioners what relief they were entitled to, namely, a deletion of the names of the witnesses appearing in the Government memorandum. No novel question is presented here. A decision on the merits by this Court is likely to have no value whatever as a precedent in future cases. This case was reviewed by the Court of Appeals on its own unique facts. The guidelines or standards for such review have long been settled.

Thus, there are no reasons which warrant further review of any matters in this case by this Court. The petition for a writ of certiorari should be denied.

ARGUMENT

1. THE DISTRICT COURT HAD DISCRETION TO UNSEAL THE DOCUMENT AND THE COURT OF APPEALS CORRECTLY DECIDED THAT THIS DISCRETION WAS NOT ABUSED.

Assuming, *arguendo*, the Government memorandum to be subject to the secrecy strictures of Rule 6(e), that Rule expressly provides that "a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the Court preliminary to or in connection with a judicial proceeding." It has long been settled that disclosure, pursuant to this Rule, is left to the sound discretion of the trial Court. *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S.Ct. 1237 (1959); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811 (1940); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983 (1958); *United States v. Rose*, 215 F.2d 617 (3rd Cir., 1954); *United States v. Byoir*, 147 F.2d 336 (5th Cir., 1945); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563 (2nd Cir., 1961); *Costello v. United States*, 255 F.2d 389 (8th Cir., 1958).

In *Pittsburgh Plate Glass Co. v. United States*, this Court said:

> "Grand jury secrecy is, of course, not an end in itself. Grand jury secrecy is maintained to serve particular ends. But when secrecy will not serve those ends or when the advantages gained by secrecy are outweighed by a countervailing interest in disclosure, secrecy may, and should, be lifted for to do so in such circumstances would further the fair administration of criminal justice." 360 U.S. at 403.

It could not be an abuse of discretion for Judge Westover to have vacated an order sealing the Government Memorandum *unless Rule 6(e) required that the document be filed under seal in the first instance.* It cannot be seriously suggested that Judge Stephens was powerless to permit, if not to require, the Government to file a memorandum summarizing information obtained from the grand jury investigation in connection with the sentencing of the defendants below. And that is what he did. That the petitioners' argument is wholly devoid of any merit and is fashioned only to meet the exigencies of the treble damage litigation is demonstrated by the fact that not once during the criminal cases did any of them suggest to Judge Stephens that Rule 6(e) *required* that the Government document be sealed and petitioners fail to cite even a single case which holds, or even suggests that Rule 6(e) *required* Judge Stephens to seal the Government memorandum. Clearly, therefore, Judge Westover had the discretion to do what Judge Stephens could have done *ab initio.*

The notion that "a consenting defendant could gain the additional benefit of holding under a seal or stricture of non-disclosure for an indefinite time, information which would otherwise be available to the public, or at least to other litigants who had need of it" was laid to rest in *Olympic Refining Co. v. Carter,* 332 F.2d 260, 265 (9th Cir. 1964), cert. denied 85 S. Ct. 186 (1964).

The record below reflected that Judge Westover had had painstaking experience with the No-Joint and Perovich litigation, as well as the Government civil litigation. Faced with complex litigation in which the parties below

repeatedly have asserted the close relationship between the allegations of proof in the No-Joint and Perovich cases and the indictments, he simply vacated an order which, we submit, should never have been entered in the first place. And, as Judge Westover put it, where a document "has been filed and docketed in a criminal case, everybody has a right to look at it". We know of no rule or case which impairs the validity of that sound reasoning—or which suggests that it is an abuse of discretion to hold, in these circumstances, as Judge Westover did.

In holding that Judge Westover did not abuse his discretion, the Court of Appeals cited its decision in *Olympic Refining Co. v. Carter*, supra, as typifying "judicial appreciation of the benefits of a liberal discovery procedure". In that context, the Court of Appeals pointed out that it seemed

> "highly inequitable and adverse to the principle of federal discovery to allow one party access to a Government document and not the other. It is particularly inequitable when the policy reason for denying the other party access to the document is essentially inapplicable to the given situation. We cannot say the District Court has abused its discretion by ordering the document unsealed."

Thus, prior disclosure did not "justify" disclosure to respondents, but such disclosure certainly was a factor appropriately considered in the exercise of the district judge's discretion.

2. NO POLICY REASONS EXIST WHICH REQUIRE SECRECY TO BE MAINTAINED.

The real issue presented to the Court of Appeals was not whether the district court had the *power*[7] to order disclosure but whether the District Court abused its discretion in so doing. In reaching the conclusion that the District Court did not abuse its discretion, the Court of Appeals agreed with petitioners' contention that a violation of the traditional grand jury secrecy should be permitted only upon a showing of "particularized and compelling need". But the Court of Appeals noted that

> ". . . we cannot treat this test *in vacuo*. We must take recognition first of the fact that where such a 'need' exists is a matter designedly left initially to the discretion of the trial judge. . . . Secondly, it must be kept in mind that in making a determination of when to permit a disclosure of grand jury proceedings, whether to examine not only the need of the party seeking disclosure, but also the policy considerations for grand jury secrecy as they apply to the request for disclosure there under consideration. In other words, if the reasons for maintaining secrecy do not apply at all in a given situation or apply to only an insignificant degree, the parties seeking disclosure should not be required to demonstrate a large compelling need."

The Court of Appeals concluded that the policy reasons for maintaining secrecy applied here "to only an insignificant degree". Carefully examining the policy reasons behind grand jury secrecy and citing this Court's opinion

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[7]Cf. *Ex Parte Uppercu*, 239 U.S. 435 (1915); *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir., 1964), cert. denied 85 S.Ct. 186 (1964).

in *United States v. Procter & Gamble, supra*, the Court of Appeals concluded that in this case "the only basis for a compelling reason to maintain the traditional grand jury secrecy (was) that of ensuring untrammeled disclosure by *future* grand jury witnesses". (Emphasis original.) In this connection, the Court of Appeals itself deleted references to witnesses' names which were contained in the Government memorandum. The Court of Appeals said:

> "Having examined the document in camera as the trial court might have done, we have deleted such portions of the memorandum as we have deemed necessary in respect to the policy considerations behind the rule of secrecy of grand jury investigations. We have returned five originals of the document, as deleted (but without disclosing the deletions), to the District Court for filing, without seal, in the five actions below; retaining one copy as so revised for our own Court files, and retaining all excised copies in our own files, under seal."

Petitioners' repeated reference to the opinions of this Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983 (1958), and *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S.Ct. 1237 (1959), are not pertinent to the question presented by this record. Both of those cases involved the disclosure of grand jury *transcript*. In *Procter & Gamble*, this Court, in reversing the dismissal of a civil Government antitrust case for failure of the Government to comply with the District Court's direction to turn over an *entire* grand jury transcript pursuant to a Rule 34 motion of the defendants, said:

> "We only hold that no compelling necessity has been shown for the *wholesale* discovery and production of a grand jury transcript under Rule 34." (Emphasis original; 356 U.S. p. 683.)

And in *Pittsburgh Plate Glass* this Court did no more than to reject defendant's argument that the "trial judge's discretion under Rule 6(e) must be exercised in accordance with the rationale of Jencks". (Referring to the case of *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007 (1957).) In short, this Court held that the grand jury transcript of a witness who also testifies at trial was not available to the defendant as a matter of *right* under the *Jencks* decision.

Finally, petitioners' citation of *Procter & Gamble* and *Pittsburgh Plate Glass* for the proposition that prior disclosure does not justify further disclosure misses the mark. In neither case was there any "prior disclosure." Surely, the *knowledge* of the Government lawyers in those cases cannot be equated with the *actual revelation to defense counsel* here.

The carefully considered opinion of the Court of Appeals, which not only examined and rejected each of the contentions made here, but which also granted petitioners the limited relief of deleting the names of witnesses, reached the correct conclusion. There is no need for this Court to reexamine that result.

CONCLUSION

For the reasons stated herein, the questions posed by petitioners do not merit further consideration by this Court. The Perovich and No-Joint respondents respectfully urge that the petition for certiorari be denied.

Dated, May 11, 1965.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1136

U.S. INDUSTRIES, INC., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–9; R. 201) is not yet reported. The district court did not file a written opinion; its order (R. 120) is unreported.

JURISDICTION

The order of the court of appeals was entered on April 7, 1965. The petition for a writ of certiorari was filed on May 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In connection with certain criminal antitrust cases, the government filed, and the district court ordered

sealed, a pre-sentencing memorandum which contained material protected by grand jury secrecy. The question presented is whether the courts below properly released the memorandum to private plaintiffs in treble-damage suits against the same defendants when the memorandum had already been disclosed to defense counsel in the course of sentencing, the criminal cases had been completed, and the court of appeals deleted the portions of the memorandum whose disclosure would reveal the identity of grand jury witnesses.

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in part:

> *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

STATEMENT

Petitioners are corporations and corporate officers, who were convicted of violations of Section 1 of the

Sherman Act (15 U.S.C. 1), upon their pleas of *nolo contendere;* and individuals who allege that they testified before the grand jury which returned the five indictments resulting in such convictions (Pet. App. 1). The indictments charged conspiracies to allocate orders and to rig bids for products of the concrete and coated-steel-pipe industry (Pet. 4).

In connection with sentencing, the government prepared a "Memorandum of Government Relating to the Imposition of Sentences and Fines," which was attached to the pre-sentencing report of the probation office (Pet. 5–6). The memorandum, although not a grand jury document, contained information protected by the policy of grand jury secrecy under Rule 6(e) of the Federal Rules of Criminal Procedure. It was made available to and read by the attorneys for the defendants in the criminal cases, and was filed under seal (Pet. App. 2, 7).

In the meantime, six treble-damage suits had been filed against defendants who were also defendants in the criminal cases, alleging injuries from violations of the Sherman Act involving activities encompassed within the criminal indictments. After conclusion of the criminal cases, the plaintiffs in these treble-damage suits sought access to the government pre-sentencing memorandum by subpoenas addressed to government counsel. Judge Stephens transferred the matter to Judge Harry C. Westover before whom the civil antitrust cases were pending. Judge Westover ruled that the order sealing the government memorandum should be vacated and the subpoena quashed (R. 186–187, 190); and on October 6, 1964, an order was entered

to that effect (R. 120).[1] The Court of Appeals for the Ninth Circuit affirmed the district court order after deleting parts of the memorandum, denying petitioners' application for writs of prohibition and mandamus.

While the Ninth Circuit recognized that disclosure of grand jury material should be permitted only upon a showing of "particularized and compelling need," it also noted that the justification for disclosure must be assessed in light of the particular facts of the case and their relation to the reasons for grand jury secrecy. Since the criminal case was over, the only particular "compelling reason" for secrecy was to encourage untrammeled testimony of future grand jury witnesses (Pet. App. 5–7). Supporting disclosure was the fact that the defendants had already enjoyed the opportunity to inspect the memorandum, and it would be "highly inequitable and adverse to the principles of federal discovery to allow one party access to a government document and not the other" (Pet. App. 9). In these circumstances, the court of appeals held that the district court could properly

[1] The proceedings below followed the course used in *Olympic Refining Company* v. *Carter*, 332 F. 2d 260 (C.A. 9), certiorari denied, 379 U.S. 900. The private plaintiffs served a deposition subpoena *duces tecum* on Stanley E. Disney, Chief of the Los Angeles Office of the Antitrust Division, and the government responded by filing a motion before Judge Stephens asking that the sealing order be modified to grant the private plaintiffs access to the government memorandum and to quash the subpoena duces tecum (R. 44, Pet. App. 2–3). The private plaintiffs joined in the government's motion to permit disclosure of the memorandum and filed supporting briefs (R. 55–62).

grant disclosure of the contents of the pre-sentencing memorandum, so long as it took steps, by deleting witnesses' names or by other means which would maintain their anonymity, to protect the policy of grand jury secrecy. In this matter of first impression, the court of appeals took the appropriate action itself, deleting portions of the government memorandum and returning excised copies to the district court for filing, without seal, after retaining one copy of the original document in its own files (Pet. App. 8).

ARGUMENT

Disclosure of excised copies of the government pre-sentencing memorandum to treble-damage plaintiffs was a proper exercise of judicial discretion on the particular facts of the case where the memorandum had already been disclosed to the defendants' counsel. Further review is not warranted.

1. Rule 6(e) of the Federal Rules of Criminal Procedure, which embodies the rule that grand jury testimony is confidential (*United States* v. *Procter & Gamble Company*, 356 U.S. 677; *Pittsburgh Plate Glass Company* v. *United States*, 360 U.S. 395), allows disclosure "when so directed by the court preliminarily to or in connection with a judicial proceeding."[2] For "after the grand jury's functions are

[2] This is the provision governing initial disclosure to the criminal defendants, or members of the public. As discussed, *infra*, pp. 7–8, Rule 6(e) specifically provides in its first sentence for disclosure without the need for leave of court "to the attorneys for the government for use in the performance of their duties."

ended, disclosure is wholly proper when the ends of justice require it." *United States* v. *Socony-Vacuum Oil Company,* 310 U.S. 150, 233–234.[3] But such disclosure requires a showing of particularized, compelling need. *United States* v. *Procter & Gamble Company, supra; Pittsburgh Plate Glass Company* v. *United States, supra.* While most cases deal with disclosures sought by criminal defendants, the same standard must be met when disclosure is sought by private parties seeking to use the material in civil suits against the criminal defendants.[4]

2. Here private plaintiffs asserted a need based upon prior disclosure of the same material to the counsel for the criminal defendants in the course of the criminal cases. A number of these defendants are subject to pending civil suits, arising from the same conduct which was the basis for the criminal convictions. As the court below pointed out, it would be "highly inequitable" not to grant private adversaries equal access to the government document (Pet. App. 9). We believe that "the ends of justice" (*United States* v. *Socony-Vacuum Oil Company,* 310 U.S. at 234) sup-

[3] See *Pittsburgh Plate Glass Company* v. *United States,* 360 U.S. at 399; *In re Grand Jury Proceedings,* 309 F. 2d 440, 444 (C.A. 3); *Herzog* v. *United States,* 226 F. 2d 561, 566 (C.A. 9). See also Wigmore, *On Evidence,* McNaughton Revision, Vol. VIII, Sec. 2362, p. 737.

[4] *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce,* 323 F. 2d 233 (C.A. 5); *In re Sellers,* 32 F.R.D. 473 (N.D. Ill.); *Consolidated Edison Co. of New York v. Allis-Chalmers Mfg. Co.,* 217 F. Supp. 36 (S.D.N.Y.); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 194 F. Supp. 763 (D. Mass).

ported disclosure to the plaintiffs, so as to give them such equal access to necessary information.[8]

Petitioners rely on *United States* v. *Procter & Gamble Company, supra,* as contrary to the view that disclosure of grand jury material to one party in a case may warrant disclosure to the other party. In that case, the Court rejected the argument that the government's use of a grand jury transcript in the preparation of a civil case of itself entitled the civil defendant to disclosure. The point is, however, that the initial disclosure in *Procter & Gamble* was to the government pursuant to the first sentence of Rule 6(e) which provides for disclosure, without leave of court, "to the attorneys for the government for use in the performance of their duties", an authority which extends to government civil suits as well as criminal prosecutions. *United States* v. *General Electric Company,* 209 F. Supp. 197, 199 (E.D. Pa.); *In re Petroleum Industry Investigation,* 152 F. Supp. 646 (E.D. Va.).

Government counsel's knowledge of grand jury proceedings is inherent in the grand jury system and is

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[8] The claims of the treble-damage plaintiffs could have been satisfied by a specific grant of access to them, instead of an unsealing order. We believe that the general release of the document was justified, first, by the fact that the prior disclosure to defense counsel had not been limited by any condition (see Pet. App. 9, fn. 1) and, second, by the substantial number of damage suits which are pending or due to be filed against the corporate petitioners. In addition to the six suits below, actions have been instituted by a number of States and local governmental bodies. The necessary broad reach of access to private plaintiffs made it reasonable to vacate the sealing order.

in fact essential to the functioning of the system. But further disclosure to a private party is considered an initial public disclosure and must meet the test discussed by this Court in *Procter & Gamble*. In this case, however, secrecy had already been breached by the initial disclosure to petitioners' counsel. The further disclosure to the civil plaintiffs of the substance of the specific and identified material which had been disclosed to the defendants was therefore within the discretionary power of the trial court under Rule 6(e).

3. This result is strongly supported, as the court below noted, by the limited force of the policy of grand jury secrecy in the circumstances of this case. A number of the reasons for secrecy expired with the close of the criminal cases against petitioners. The primary remaining reasons—the encouragement of testimony by future grand jury witnesses and the protection of innocent persons mentioned in the grand jury testimony—have peculiarly little force on the facts of this case. While it is true that future witnesses would be deterred by knowledge that their testimony might be disclosed, this policy is particularly concerned with disclosure to the criminal defendants themselves. *Pittsburgh Glass Company* v. *United States*, 360 U.S. at 399. Since the defendants in the present case had already enjoyed access to the government memorandum, this reason for secrecy was of limited significance. Moreover, the Ninth Circuit took steps to assure that the anonymity of grand jury witnesses was protected by making appropriate dele-

tions from the government memorandum. As the court stated, this gave effect to "the policy considerations behind the rule of secrecy of grand jury investigations," while permitting disclosure of the document's substance (Pet. App. 8). Nor is there merit to petitioners' contention that the court ignored the rights of innocent persons who were mentioned in the grand jury testimony but exonerated in the investigation. The government memorandum was drafted for the purpose of advising the court on the sentencing of those persons and corporations which had been indicted and convicted. There is no reason whatever to believe that persons exonerated are identified in the document, especially after the deletions made by the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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